No. 92-191

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

INTERCONTINENTAL LIFE INSURANCE COMPANY, PETITIONER

v.

LOU R. LINDBLOM, RESPONDENT

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an award of punitive damages violates the Due Process Clause when it does not bear a reasonable relationship to the award of compensatory damages and is not subjected to meaningful review by the trial and appellate courts.

RULE 29.1 STATEMENT

Petitioner InterContinental Life Insurance Company ("InterContinental") is a wholly-owned subsidiary of Standard Life Insurance Company. Standard Life Insurance Company, in turn, is a wholly-owned subsidiary of InterContinental Life Corporation ("ILCO"). ILCO is controlled by Financial Industries Corporation ("FIC"), through FIC's ownership of 40.4% of ILCO's outstanding common stock and FIC's option to purchase approximately 16.5% of ILCO's common stock. InterContinental has no subsidiaries other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

InterContinental Life Insurance Company ("InterContinental") respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The opinion of the Alabama Supreme Court after this Court's remand (App. A, *infra*, 1a-12a) is not yet reported. The order of this Court remanding this case for further consideration in light of *Pacific Mutual Life Insurance Company* v. *Haslip*, 111 S. Ct. 1032 (1991), (App. B, *infra*, 13a) is reported at 111 S. Ct. 1575 (1991). The opinion of the Alabama Supreme Court before this Court's remand (App. C, *infra*, 14a-32a) is reported at 571 So. 2d 1092. The order of the circuit court before this Court's remand (App. D, *infra*, 33a-39a) is unreported.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on May 1, 1992. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

This case is one of the twelve punitive damages cases remanded by this Court for further consideration in light of *Pacific Mutual Life Insurance Company* v. *Haslip*, 111 S. Ct. 1032 (1991). Despite this Court's admonishment in *Haslip* that the Due Process Clause requires a reasonable relationship between punitive and compensatory damages, many courts, including the Alabama Supreme Court in this case, have permitted punitive awards to stand even when such a relationship does not exist. Here the Alabama Supreme Court upheld a punitive damages award that is *80 times* the size of the compensatory award, even though InterContinental's actions were far less egregious than those at issue in *Haslip*—where this Court indicated that a four-to-one ratio between punitive and compensatory damages bordered on unconstitutionality. The award here, moreover, far exceeds any amount that could be considered reasonably necessary to further the State's goals of deterrence and retribution. Because the lower courts are in disarray on the standards governing such awards, review by this Court is appropriate.

A. Factual Background.

On December 1, 1980, InterContinental issued a $10,000 life insurance policy to Tommie L. Rodenberry. App., *infra*, 15a. The policy designated Rodenberry's daughter, Lou R. Lindblom, the respondent in this case, as the beneficiary. *Ibid.* The first quarterly payment was due on December 1, 1980. *Ibid.* The policy expressly granted a 31-day grace period for late premium payments. *Ibid.* Payments received after the due date but during the 31-day grace period would be credited against the policy by InterContinental and the policy would remain in force. In addition, InterContinental treated as timely payments that arrived during the two-week period immediately following the 31-day grace period, although it did not apprise its policyholders of this practice. App., *infra*, 16a, 19a-20a. This two-week period is known as the "courtesy period" (*id.* at 15a-16a, 19a-20a); such unpublicized courtesy periods are common in the insurance industry (Tr. 312).[1] If the last day of the courtesy period fell on a weekend or holiday, the period extended to the next business day. *Id.* at 16a. If the courtesy period ended without receipt of the premium, however, the policy was deemed lapsed. Tr. 212, 374-375.

On January 1, 1984, Lindblom (who handled the payments on Rodenberry's policy) asked InterContinental to switch the payment schedule from quarterly to monthly, as the policy permitted. App., *infra*, 16a. Together with that request, Lindholm included a payment specifically designated for the December 1983

[1] While the record does not expressly so state, insurers offer such courtesy periods because policyholders tend to pay on the last possible date and insurers would rather not lapse policies when payments are only a few days late.

premium; she asked InterContinental to bill her for the January 1984 premium. *Ibid.* InterContinental applied Lindblom's payment to the December 1983 premium (Tr. 416) and changed the payment schedule as Lindblom requested. However, InterContinental apparently did not bill Lindblom for the January premium (nothing in the record suggests that she was entitled to demand such billing), and Lindblom never tendered a check designated for the January premium. Lindblom next sent a check to InterContinental dated February 2, 1984. Tr. 103. She testified that she intended this check to cover the payment due February 1 (Tr. 155) but nothing in the record indicates that Lindblom instructed InterContinental to apply this payment to the February premium. Because Lindblom had not paid the January premium, InterContinental applied her check to that past-due premium and treated the payment as timely because it arrived within the courtesy period. App., *infra*, 16a.

Lindblom never cured the arrearage, but she did continue to send a premium payment to InterContinental sometime during the first half of each month after the premium was due. Because the payments chronically were a month behind, each payment arrived after the end of the 31-day grace period but before the expiration of the two-week courtesy period. InterContinental continued to apply each payment to the previous month's past-due premium. App., *infra*, 16a-17a. This pattern continued for a year and a half, with Lindblom receiving credit for premium payments through July 1985.

The pattern changed in September 1985. Lindblom mailed InterContinental the payment for August 1985 by check dated September 15, 1985. September 15th was the last day of the courtesy period. App.,

infra, 5a n.1. InterContinental did not receive the payment nor post it until both the grace and courtesy periods had ended.[2] Tr. 216, 435. InterContinental's computer system flagged the policy as lapsed (Tr. 472, 499-500) and credited the payment to an escrow account pending review of the policy (Tr. 258-259). After determining that the policy had lapsed (and before Rodenberry's death), InterContinental notified Lindblom that the policy had lapsed. App., *infra*, 17a. At Lindblom's request, InterContinental reviewed its records and confirmed that the policy had lapsed because Lindblom had not paid the August 1985 premium before the end of the courtesy period. Tr. 414-415, 582. InterContinental eventually refunded the escrowed payment to Lindblom. App., *infra*, 18a.

Rodenberry died on October 23, 1985. *Ibid.* On November 8, 1985, Lindblom filed a claim with InterContinental for the policy benefits. Tr. 133-134, 379. When it reviewed the claim, InterContinental learned for the first time that Rodenberry had been ill. InterContinental did not know of Rodenberry's illness when

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[2] InterContinental used a computer system to track premium payments. Payments accompanied by premium notices were posted in the computer system within seven to ten days of receipt. Tr. 551, 553. Payments might not be posted until later if received without premium notices, with the wrong payment amount, on weekends, or with a request to change the payment schedule. Tr. 554. Several times a month, InterContinental's computer system generated printouts reporting the status of the premium payments. Tr. 474, 520. One printout ("the final notice run sheet") listed all policies with past-due premiums for which the 31-day grace period had not yet expired. Another printout ("the lapse listing") listed all policies that had lapsed for failure to pay the premiums before the end of the courtesy period. Tr. 470.

it terminated the policy. Tr. 216-217, 221, 269, 430. Because the policy had lapsed almost two months before Rodenberry died, InterContinental denied Lindblom's claim. App., *infra*, 18a.

B. The Proceedings Below.

Lindblom then sued InterContinental in Alabama state court. She sought $10,000 in compensatory damages (the face value of the policy), interest, and punitive damages.[3] A jury awarded Lindblom $3,012,400 in compensatory and punitive damages against InterContinental for bad faith failure to pay insurance benefits, breach of contract, misrepresentation, and fraud.[4] The trial court denied InterContinental's motion to set aside the punitive damages award. App., *infra*, 38a. It specifically rejected InterContinental's claims grounded in the Due Process Clause of the Fourteenth Amendment. *Id.* at 37a-38a.

The Alabama Supreme Court affirmed. App., *infra*, 14a-32a. It refused to recognize InterContinental's courtesy period because it was not part of the written policy. The court characterized the courtesy period as appearing "to be merely a convenient way for Inter[C]ontinental to justify its acceptance of premium payments outside of the 31-day grace period,

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[3] Lindblom also sued the insurance agency that had sold the policy to Rodenberry. The jury found the agency not liable. App., *infra*, 18a-19a.

[4] As this Court is well aware from the *Haslip* litigation, Alabama law permits a jury to return a verdict in a single dollar amount that combines compensatory and punitive damages. In this case, however, it is beyond dispute that the amount of the compensatory damages was no more than $12,400—the proceeds payable under the policy together with prejudgment interest—and that the remaining 99% of the award constituted punitive damages.

insure continued payments, and keep the policy in force, all without the knowledge of the insured or the beneficiary." *Id.* at 20a. Describing the courtesy period as a "practice" of continuously applying late payments to previously-due premiums, the court held that InterContinental could not "arbitrarily cease this practice and treat the policy as lapsed in August 1985 by claiming that payment was not made within the 31-day grace period."[5] *Ibid.* The court consequently held that InterContinental waived its right to lapse the policy by not doing so when Lindblom failed to make the January payment before the 31-day grace period expired and by accepting payments past the 31-day grace period. *Ibid.* Thus, concluded the court, InterContinental could not declare the policy lapsed because Lindblom failed to make the August 1985 payment before the courtesy period expired. It held, accordingly, that the jury could find that InterContinental's failure to pay Lindblom's claim constituted bad faith under Alabama law. *Id.* at 27a.

The Alabama court specifically considered and rejected InterContinental's challenge to the punitive damages award under the federal Constitution. Relying on its prior decision in *Haslip*, the court simply stated that "th[e] award is not unconstitutional." App., *infra*, 26a. The court did, however, find that the penalty was excessive as a matter of Alabama law and without explanation remitted it by $2,012,400 to

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[5] Of course, InterContinental did not lapse policies on the basis of the 31-day grace period. It lapsed them for failure to pay the premiums due by the end of the 45-day combined grace and courtesy periods. By holding invalid and then ignoring the courtesy period, the court fundamentally recast the ground relied on by InterContinental in determining that Rodenberry's policy had lapsed.

$1,000,000. *Id.* at 29a-30a. It therefore affirmed the trial court's judgment, conditioned on Lindblom's acceptance of the remittitur (which she has done).

InterContinental petitioned this Court for certiorari and obtained a stay pending disposition of the petition (A-440, 1990 U.S. LEXIS 6356 (Dec. 14, 1990) (Kennedy, Circuit Justice)). The Court then granted InterContinental's petition for certiorari, vacated the judgment of the Alabama Supreme Court, and remanded the case for further consideration in light of *Haslip*, 111 S. Ct. 1032. App., *infra*, at 13a.

In its opinion after remand (App., *infra*, 1a-12a), the Alabama Supreme Court reinstated the $1,000,000 judgment. The court relied on another Alabama case also on remand after *Haslip*, *Southern Life and Health Insurance Company* v. *Turner*, 586 So. 2d 854 (Ala. 1991), in which it had rejected an excessiveness challenge where the ratio of punitive to compensatory damages was 499-to-one—not, as would be expected, by comparing the 499-to-one ratio to the four-to-one ratio found close to the constitutional line in *Haslip* but instead by relying on two *pre-Haslip* Alabama opinions (*U-Haul Company of Alabama* v. *Long*, 382 So. 2d 545 (Ala. 1980) and *Nationwide Mutual Insurance Company* v. *Clay*, 525 So. 2d 1339 (Ala. 1987), cert. denied, 488 U.S. 1040 (1989)). Refusing to attach any special weight to the presence of a grossly disproportionate relationship between punitive and compensatory damages, the *Turner* court insisted that it need only "evaluate the facts and merits of each case according to the factors set out in *Green Oil Co*[*mpany* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989)] and *Central Elec*[*tric Cooperative* v. *Tapley*, 546 So. 2d 371 (Ala. 1989)]." See *Turner*, 586 So. 2d at 858.

The Alabama Supreme Court in this case also rejected InterContinental's argument that the reprehensibility of its conduct was slight and hence could not support the large punishment exacted here. It opined that the jury could reasonably have found that InterContinental accepted premium payments after the end of the grace period intending, in the event of a claim, to treat the policy as lapsed. If litigation ensued, the court hypothesized, InterContinental would point to the courtesy period and thus preclude adverse verdicts for bad faith or fraud. App., *infra*, 6a-7a. The court also held that "the jury could reasonably have concluded that InterContinental did not *actually* regard the policy as lapsed until *after* the death of the insured."[6] *Id.* at 7a (emphasis in original).

REASONS FOR GRANTING THE PETITION

THIS CASE PROVIDES AN OPPORTUNITY FOR THIS COURT TO RESOLVE THE CONFUSION AMONG THE LOWER COURTS REGARDING THE MEANING OF *HASLIP*'S DUE PROCESS PROTECTION AGAINST DISPROPORTIONATE PUNITIVE DAMAGES AWARDS.

1. In recent years, this Court repeatedly has expressed its concern about the problem of "punitive damages that 'run wild.' " *Haslip*, 111 S. Ct. at 1043. *Haslip* was the Court's initial response to this problem. Recognizing that "extreme results" in cases involving punitive damages may "jar one's constitutional sensibilities" (*ibid.*), the Court held that a punitive award may not be "greater than reasonably necessary to punish and deter." *Id.* at 1046. At the same time, however, the fact-specific nature of *Has-*

[6] The Alabama Supreme Court offered these interpretations despite a complete absence of supporting record evidence.

lip's holding led two Justices to predict that the Court would be forced to revisit the punitive damages problem. See *id.* at 1054 (Scalia, J., concurring in the judgment); *id.* at 1055 (Kennedy, J., concurring in the judgment). Given the difficulty the lower courts have had in applying *Haslip's* mandate, it may fairly be said that further consideration of the issue by the Court is inevitable. We submit that the time for such consideration has now arrived.[7]

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[7] All but one of the 12 cases remanded by this Court for reconsideration in light of *Haslip* have been decided. *Fleming Landfill, Inc.* v. *Garnes*, 111 S. Ct. 2882, on remand, 413 S.E.2d 897 (W. Va. 1991); *Transamerica Occidental Life Ins. Co.* v. *Koire*, 111 S. Ct. 2253, on remand, No. B036342, slip op. (Cal. Ct. App. Sept. 20, 1991); *Southern Life and Health Ins. Co.* v. *Turner*, 111 S. Ct. 1678, on remand, 586 So. 2d 854 (Ala. 1991); *AMCA Int'l Fin. Co.* v. *Hilgedick*, 111 S. Ct. 1614 (1991), on remand, 8 Cal. Rptr. 2d 76 (Cal. Ct. App. 1992); *InterContinental Life Ins. Co.* v. *Lindblom*, 111 S. Ct. 1575 (1991), on remand, 589 So. 2d 886 (Ala. 1992); *International Soc'y for Krishna Consciousness* v. *George*, 111 S. Ct. 1299 (1991), on remand, 4 Cal. Rptr. 2d 473 (Cal. Ct. App. 1992); *Pacific Lighting Corp.* v. *MGW, Inc.*, 111 S. Ct. 1299 (1991), on remand, 6 Cal. Rptr. 2d 888 (Cal. Ct. App. 1992); *Church of Scientology* v. *Wollersheim*, 111 S. Ct. 1298 (1991), on remand, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992); *Hospital Auth.* v. *Jones*, 111 S. Ct. 1298, on remand, 409 S.E.2d 501 (Ga. 1991), cert. denied, 112 S. Ct. 1175 (1992); *Reserve Life Ins. Co.* v. *Eichenseer*, 111 S. Ct. 1298, on remand, 934 F.2d 1377 (5th Cir. 1991). In only one of those cases, *Garnes*, did the lower court vacate the punitive damages award on federal constitutional grounds. In *Post Office* v. *Portec, Inc.*, 935 F.2d 1105 (10th Cir. 1991), the court dismissed the appeal as moot pursuant to the parties' stipulation. The Eighth Circuit has not yet decided *Clayton Brokerage Co.* v. *Jordan*, opinion before remand, 861 F.2d 172 (8th Cir. 1988).

In the 17 months since *Haslip* was decided, the lower courts have announced themselves increasingly befuddled about how to apply the principles enunciated in the decision. The West Virginia Supreme Court of Appeals, for example, has read decisions of the Georgia and Nevada Supreme Courts as holding, respectively, that *Haslip* offers "mere platitudes" and is "a wholesale endorsement of punitive damages"—to which the West Virginia court responded, "[i]t is not!" *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906, 907 (W. Va. 1991). Judges of other courts have suggested that this "Court's opinion in [*Haslip*] did not make clear which elements of a system of awarding punitive damages are constitutionally necessary," noting the "whimsy, irrationality, and utter unpredictability infecting punitive damages awards in this state." *Hilgedick* v. *Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 94 (Cal. Ct. App.), r'hrg denied and opinion modified, No. A039723, 1992 WL 100507 (Cal. Ct. App. May 14, 1992) (concurring opinion). And a justice of the court below has taken his colleagues to task for simply disregarding this Court's mandate in *Haslip*. *Southern Life & Health Ins. Co.* v. *Turner*, 586 So. 2d 854, 860-861 (Ala. 1991) (Maddox, J., concurring in the result). It accordingly now is plain that the lower courts will not reach a consensus on how to apply *Haslip's* principles and that further guidance from this Court is essential.

The necessity for such guidance is made manifest by the decisions of the court below, which depart from what appear to be the central holdings of *Haslip* in two respects: they expressly disavow both the requirement of a relationship between the compensatory and punitive awards, and the need for *independent* judicial review (post-trial and on appeal) of pun-

itive awards. In saying this, of course, we do not suggest that the Court should announce a simple set of rigid formulae for determining the availability and size of punitive damages; instead, the delineation of constitutional standards appears likely to develop in common-law fashion over a series of decisions involving a continuing interplay between this Court and the lower courts. But that process will not move forward until this Court makes clear that the constitutional standard is not toothless, which will require the reversal of some punitive award. This case, in which a punitive judgment of $1 million was affirmed in what amounted to a routine contract dispute, offers the Court an opportunity to provide urgently needed guidance.

2. In *Haslip* the Court affirmed the award on the understanding that punitive judgments cannot be "grossly out of proportion to the severity of the offense and [must] have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. While the Court did not identify a maximum permissible ratio between punitive and compensatory awards, the requirement that there be a discernible relationship between the two follows necessarily from the justification for punitive damages. Except in unusual cases (as where, for example, an action that might have caused great harm fortuitously results only in modest injury), both the appropriate punishment and the sanction needed to deter future similar conduct is likely to be related to the seriousness of the injuries actually suffered. In *Haslip* itself the ratio of punitive-to-compensatory damages was approximately four-to-one, which the Court found to be "close to the line" of unconstitutionality. *Id.* at 1046.

A number of courts, however, have construed *Haslip* to require *no* meaningful relationship between punitive and compensatory damages. Principal among them is the court below, which in *Turner*—the decision upon which the holding below relied—affirmed an award with a 499-to-one ratio while insisting that "punitive damages need not necessarily bear any particular relationship to compensatory damages." 586 So. 2d at 858. See also *Associates Fin. Servs. Co.* v. *Barbour*, 592 So. 2d 191, 199 (Ala. 1991); *General Motors Corp.* v. *Johnston*, 592 So. 2d 1054, 1063 (Ala. 1992); *Principal Fin. Group* v. *Thomas*, 585 So. 2d 816 (Ala.) (per curiam) (affirming award with 750-to-one ratio), cert. denied, 112 S. Ct. 649 (1991). Indeed, Justice Maddox took his colleagues to task in *Turner* for precisely that holding, explaining that they failed to address

> an issue the Supreme Court of the United States considers to be relevant—the size of the punitive damages award when compared to the actual loss suffered. On the contrary, this Court specifically states that it finds "no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages," and that "[s]uch a relationship would inevitably result in injustice, and we decline to impose it." If that holding says what it seems to say, then this Court believes that a comparison of the size of the punitive damages award to the amount of actual loss suffered is not relevant. Of course, the Supreme Court of the United States seems to say that such a comparison is relevant.

586 So.2d at 860-861 (Maddox, J., concurring).[8]

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[8] The Georgia Supreme Court and the United States Court of Appeals for the Fifth Circuit also have held that *Haslip*

In contrast, some courts "believe that *Haslip* offers more than mere platitudes." *Garnes*, 413 S.E.2d at 906. The West Virginia Supreme Court of Appeals, for example, concluded that *Haslip* requires that "[a]s a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." *Id.* at 909.[9] Overruling prior West Virginia

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does not require a meaningful relationship between punitive and compensatory damages. See *Hospital Auth.* v. *Jones*, 409 S.E.2d 501, 503 & n.3 (Ga. 1991) ("reject[ing] the notion that punitive damages must necessarily bear some relationship to the *actual* damages awarded by the jury"; while "the Supreme Court in *Haslip* analyzed the punitive damages award by comparing it to the actual award, nothing in the [*Haslip*] opinion mandates such a comparison"), cert. denied, 112 S. Ct. 1175 (1992); *Eichenseer* v. *Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (relationship between punitive and compensatory damages "not dispositive"). Numerous other state courts and federal district courts have reached the same conclusion. See, *e.g.*, *Commonwealth Lloyd's Ins. Co.* v. *Thomas*, 825 S.W.2d 135, 149 (Tex. Ct. App. 1992), writ of error filed (Apr. 22, 1992); *Transportation Ins. Co.* v. *Moriel*, 814 S.W.2d 144, 149-150 (Tex. Ct. App. 1991); *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 112 S. Ct. 1941 (1992); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225, 1237-1238 (S.D. Iowa 1991); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 779 F. Supp. 994, 995-997 (W.D. Ark. 1991). See also *MGW, Inc.* v. *Fredricks Dev. Corp.*, 6 Cal. Rptr. 2d 888, 897 (Cal. Ct. App. 1992) (suggesting that a comparison of punitive to compensatory damages is "not necessarily constitutionally mandated"); *Hilgedick* v. *Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76 (Cal. Ct. App.) (ignoring the constitutional requirement altogether even though the parties squarely presented the excessiveness question), r'hrg denied and opinion modified, No. A039723, 1992 WL 100507 (May 14, 1992).

[9] The court permitted a "very narrow exception to a general rule" where actual harm was minimal but potential harm tremendous. 413 S.E.2d at 908 & n.7.

law to the extent that it stood for the proposition that a jury may award punitive damages without finding *any* compensatory damages (see *id.* at 908), the court reversed the punitive award because the absence of compensatory damages precluded a finding of a reasonable relationship between the punitive and compensatory components of the award.[10] The District of Columbia and Fourth Circuits, while less

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[10] Even those courts that have been willing to adhere to *Haslip's* mandate, however, have had difficulty in doing so. Shortly after deciding *Garnes*, the West Virginia Supreme Court of Appeals, "examin[ing] all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable" (*TXO Prod. Corp.* v. *Alliance Resources Corp.*, No. 20281, 1992 WL 102319, at *17 (W. Va. May 14, 1992)), categorized punitive damages cases and established acceptable outer limits for each category. In the first category, involving what the court termed "really stupid defendants," where compensatory damages are neither negligible nor very large, the court held that "the outer limit of punitive damages is roughly five to one." *TXO*, 1992 WL 102319, at *18-*19. In those cases where compensatory damages are "very high," the court noted that "punitive damages even in the ratio of 5:1 might be excessive." *Id.* at *19 n.12. In the second category, involving what it called "really mean defendants" (especially where compensatory damages are small and the potential for harm is great), the court concluded that "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip*." *Id.* at *19, *20. In the third category, involving "really stupid defendants," who could have caused a great deal of harm by their actions but who actually caused only minimal harm, the court permitted "a much greater ratio." Despite its seemingly exhaustive analysis, the court confessed that its classifications were somewhat arbitrary and suggested that many cases could fall into more than one category. *Id.* at *17 n.11. This capricious system represents that court's best effort to comply with *Haslip's* mandate that punitive damages should reasonably relate to compensatory damages.

elaborate in their reasoning, appear to have reached the same conclusion.[11]

Other courts have been less systematic. In their flailing about for guidance on this issue, some have even resorted to combing through this Court's denials of petitions for certiorari. For example, in *MGW*,

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[11] See *Hutchinson* v. *Stuckey*, 952 F.2d 1418, 1422 (D.C. Cir. 1992) (reversing for new trial on compensatory and punitive damages: "[w]e believe a jury should be permitted to consider the amount of actual damages in calculating a punitive damage award. *See* [*Haslip*] (upholding constitutionality of punitive damage award in part because 'post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense *and have some understandable relationship to compensatory damages*') (emphasis added). Thus, when a new trial is ordered on actual damages, the question of punitive damages should also be retried"); *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991) (the court reversed and remanded for new trial on punitive damages and, based on *Haslip* itself and post-*Haslip* state cases, required the trial court to instruct the jury that "any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury"). At least two lower courts also have adhered to *Haslip's* due process limits. See *Market Tavern, Inc.* v. *Bowen*, No. 1345, 1992 WL 93521, at *6 (Md. Ct. Spec. App. May 11, 1992); *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687, 706, 711 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992); *Dunn* v. *Owens-Corning Fiberglass*, 774 F. Supp. 929, 951 (D.V.I. 1991). For example, the Maryland Court of Special Appeals in *Alexander* concluded that "[i]f the $840,000 awarded in *Haslip* came 'close to the line' in terms of the actual loss suffered, this [award of $12,500,000, representing nearly 50 times the essentially liquidated compensatory damages] surely crosses that line." 596 A.2d at 711. Accordingly, the court vacated the punitive damages award and remanded the case for retrial on the punitive damages.

Incorporated v. *Fredricks Development Corporation*, 6 Cal. Rptr. 2d 888 (Cal. Ct. App. 1992), the court rejected a due process argument that a 5.44-to-one ratio crosses the constitutional line by pointing to this Court's refusal to review the 750-to-one ratio in an Alabama case (*Principal Financial Group* v. *Thomas*, 585 So. 2d 816 (Ala. 1991)).

Meanwhile, the system that troubled the Court in *Haslip* continues to "run wild." Even a cursory review reveals that over the past year scores of seven- and eight-figure punitive awards have survived judicial review.[12] This intolerable situation demands

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[12] See, *e.g.*, *The Narrows, L & L Enters.* v. *Gotham Ins. Co.*, No. 3AN-89-09272, slip op. (Alaska Super. Ct. 1991) ($60 million punitive; $1 million compensatory); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991) ($28 million punitive after remittitur; $390,000 compensatory (no remittitur)); *Sheridan* v. *Northwestern Mut. Life Ins. Co.*, No. CV-89-2505-PR, slip op. (Ala. Circuit Ct. Apr. 10, 1992), appeal pending, No. 1911110, (Ala. 1992) ($26 million punitive; $400,000 compensatory); *Polar Equip., Inc.* v. *Brunswick Corp.*, No. 3AN-87-3826, slip op. (Alaska Super. Ct., June 26, 1991) ($25.3 million punitive; $9.4 million compensatory); *Dunn* v. *Owens-Corning Fiberglass*, 774 F. Supp. 929 (D.V.I. 1991) ($25 million punitive; $1.3 million compensatory); *General Chem. Corp.* v. *De La Lastra*, 815 S.W.2d 750 (Tex. Ct. App. 1991) ($15 million punitive; $6.5 million compensatory); *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) ($12.5 million punitive after remittitur; $9.025 million compensatory (no remittitur)), cert. denied, 112 S. Ct. 1941 (1992); *Braswell* v. *ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991) ($9.1 million punitive; $4.55 million compensatory); *Borden, Inc.* v. *De La Rosa*, 825 S.W.2d 710 (Tex. Ct. App. 1991) ($8.5 million punitive after remittitur; $553,288 compensatory after remittitur); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 779 F. Supp. 994 (W.D. Ark. 1991) ($8 million punitive; $750,000 compensatory); *General Motors Corp.* v. *Johnston*, 592 So. 2d 1054 (Ala. 1992) ($7.5 million punitive

the Court's attention. As this Court well knows, such enormous punitive damages awards have profound systemic consequences. Businesses compelled to divert significant portions of their earnings to pay such

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after remittitur; $75,000 compensatory (no remittitur)); *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) ($6.1 million punitive; $2.59 million compensatory), cert. denied, 112 S. Ct. 1778 (1992); *Hughes* v. *Consol-Pa. Coal Co.*, 945 F.2d 594 (3d Cir. 1991) ($5.5 million punitive; $5.36 million compensatory), cert. denied, 112 S. Ct. 2300 (1992); *Banco do Brasil, S.A.* v. *Latian, Inc.*, 285 Cal. Rptr. 870 (Cal. Ct. App. 1991) ($5 million punitive after remittitur; $5.5 million compensatory (no remittitur)); *Defender Indus., Inc.* v. *Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) ($5 million punitive; $106,514 compensatory); *Fibreboard Corp.* v. *Pool*, 813 S.W.2d 658 (Tex. Ct. App. 1991) ($5 million punitive; $5.087 million compensatory), writ granted, 35 Tex. Sup. Ct. J. 682 (1992); *Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App. 1991) ($5 million punitive; $735,512 compensatory); *Republic Ins. Co.* v. *Hires*, 810 P.2d 790 (Nev. 1991) ($5 million punitive after remittitur; $410,000 compensatory (no remittitur)); *Union Nat'l Bank* v. *Mosbacher*, 933 F.2d 1440 (8th Cir. 1991) ($4.5 million punitive; $1.26 million compensatory), cert. denied, 112 S. Ct. 870 (1992); *K-Mart Corp.* v. *Pearson*, 818 S.W.2d 410 (Tex. Ct. App. 1991) ($2.2 million punitive; $1.8 million compensatory); *Collins* v. *Shell Oil Co.*, No. 610983-5, 1991 WL 147364 (Cal. Super. Ct. June 13, 1991) ($2 million punitive; $3.3 million compensatory); *Commonwealth Lloyd's Ins. Co.* v. *Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992) ($2 million punitive; $708,800 compensatory), writ of error filed (Apr. 22, 1992); *Las Palmas Assoc.* v. *Las Palmas Ctr.*, 1 Cal. Rptr. 2d 301 (Cal. Ct. App. 1991) ($2 million punitive after remittitur; $232,393 compensatory after remittitur); *Hilgedick* v. *Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76 (Cal. Ct. App. 1992) ($1.78 million punitive after remittitur; $730,482 compensatory (no remittitur)).

huge amounts (which are windfalls to a few select plaintiffs) will be forced to make up these shortfalls in other areas. See generally II American Law Institute, Reporters' Study, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 234 (1991). Concerns over liability have led companies to withdraw products, discontinue product research, and lay off workers. See, *e.g.*, *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282-283 (1989) (O'Connor, J., concurring in part and dissenting in part).

Moreover, imposing excessive punitive damages unfairly harms the shareholders and employees of penalized companies, who typically have no involvement in the misconduct but must bear the brunt of the punishment. Disproportionate penalties also overdeter and hence actually discourage socially desirable behavior. See Dobbs, ENDING PUNISHMENT IN "PUNITIVE" DAMAGES: DETERRENCE-MEASURED REMEDIES, 40 Ala. L. Rev. 831, 858-860 (1989). In the context of insurance, a well-ordered system of punitive incentives should promote more accurate and fairer handling of claims. In contrast, excessive punitive damage awards encourage insurers to pay claims that should be denied. And because underwriters assess the frequency and size of probable claims in setting premium rates, the costs of paying those dubious claims inevitably will be passed along to policyholders in the form of higher premiums. Thus, in the long run, a pattern of excessive awards will risk removing insurance from the reach of the poorer citizens of this country.

3. In addition to its disavowal of any need for a relationship between punitive and compensatory

awards, the decision below illustrates a second way in which lower courts have departed from the tenor of *Haslip*. It was central to this Court's holding in *Haslip* that the trial court offered "meaningful and adequate review * * * whenever a jury has fixed the punitive damages" (111 S. Ct. at 1044) and that the "Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at 1045. But this underpinning of *Haslip* has been withdrawn by the state court. Just four days after *Haslip* was handed down, the Alabama Supreme Court held (over three dissents) that Alabama law does not provide independent judicial review of juries' punitive damages awards but instead embodies a "presumption of correctness of the jury verdict." *Armstrong* v. *Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 421 (Ala. 1991). This conclusive interpretation of state law negates the essential premise of *Haslip*—as a dissenting justice of the Alabama court explained:

> This decision * * * should be proof positive that this Court does not consider that the *Hammond* and *Green Oil Co.* standards [cited in *Haslip*, 111 S. Ct. at 1044-1045] authorize the type of "independent review" Haslip's counsel described to the United States Supreme Court, and that the procedure that Court called "meaningful and adequate," * * * 111 S. Ct. at 1035, is neither meaningful nor adequate.
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> [T]he procedure this Court adopted in *Hammond* and *Green Oil*, and which to a large degree are

> the basis of the Supreme Court's affirmance of *Haslip*, will not protect the constitutional right of defendants to "due process of law."

Id. at 426-427 (Maddox, J., dissenting). See *Turner*, 586 So. 2d at 861 (Maddox, J., concurring) ("[p]ost-*Haslip* reviews by this Court, including this [review], indicate that the procedures, when actually applied, are not adequate and meaningful").[13]

The decision below graphically demonstrates the failure of Alabama's extraordinarily deferential judicial review to offer a meaningful check on unconstrained jury discretion. It is undisputed here that respondent's out-of-pocket loss was $12,400. Inter-Continental's "wrongful" act was its failure to recognize that the Alabama Supreme Court would not "give any validity to th[e] extended, *unwritten* grace period, as it is not part of the written contract and never became part of the contract" (App., *infra*, 20a), and that the company accordingly would be held to have "waived its right to lapse the policy by not doing so when the January payment was overdue and by accepting payments past the 31-day grace period." *Ibid.* Insofar as we are able to determine, that ruling constituted a new and unprecedented statement of Alabama law, as evidenced by the fact that no prior decisions were cited to support it.

In nevertheless holding a $1 million penalty supportable, the court below hypothesized that the jury

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[13] Alabama shares its deferential post-*Haslip* review with other courts. For example, in *Eichenseer*, the Fifth Circuit held that *Haslip* creates "a narrow channel for appellate review": [i]f there are *any* circumstances of probative force that support the amount of the award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*." 934 F.2d at 1382 (emphasis in original).

might have believed InterContinental to be engaged in an elaborate, years-long scheme to bilk respondent (and all of its similarly situated policyholders) of her insurance premiums [14]—even though InterContinental unquestionably is a reputable insurer that never before has been accused of involvement in such a "plot." In fact, the policy had lapsed and Lindblom had been notified of that lapse *before* InterContinental learned of Rodenberry's illness or death. The record is devoid of evidence of a single other instance in which it arguably could be claimed that InterContinental acted on such a basis. We have some doubt that the award would be supportable even had the court's imaginary scheme existed, since the judgment here is enormously

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[14] The court, with some understatement, characterized this hypothetical scheme as "unusually subtle." App., *infra*, 8a. The court's Rube Goldberg hypothesis went as follows: "the jury may have reasonably interpreted InterContinental's intentions as to the policy in the following manner (1) InterContinental consistently accepted premium payments after the expiration of the grace period; (2) in the event of a claim, InterContinental intended to treat the policy as lapsed; (3) in the event of litigation, InterContinental intended to justify its acceptance of the premium payments by alleging the existence of an additional unwritten 'courtesy' period; (4) InterContinental reasoned that its acceptance of the premium payments before and after the expiration of the courtesy period might estop it from denying coverage in the event of a claim, believing, however, that its liability would extend only to the amount of the policy; (5) in the event of litigation, InterContinental hoped to preclude verdicts of fraud or bad faith, with the consequent liability for punitive damages, by resorting to an argument based on the *contractual grace period*, that is, by contending that it had a contractual right to deny the benefits; and (6) InterContinental did not attempt to investigate Mrs. Lindblom's claim because, from February 1984, it knew that it was going to deny liability under the contract." *Id.* at 6a (emphasis in original).

larger than either the actual damages or Alabama's $10,000 maximum criminal fine for insurance fraud. See Ala. Code § 27-29-10 (1986). Compare *Haslip*, 111 S. Ct. at 1046. But more fundamentally, the sort of failure that occurred here to engage in any meaningful review of the record, which makes the outcome turn on whether the court can concoct a set of circumstances that could support the jury's award, *never* will lead to the setting aside of a punitive verdict.[15]

It therefore is not surprising that enormous punitive awards repeatedly have been returned and upheld, both in Alabama and elsewhere, in cases that, as the West Virginia Supreme Court of Appeals put it, involve local plaintiffs and "out-of-state (often faceless, publicly held) corporations." *Garnes*, 413 S.E.2d at 906. In fact, the Alabama court's deferential approach to punitive damages awards closely resembles a description proffered by the West Virginia Supreme Court of Appeals of the judicial review provided in some states:

> We believe that in *Haslip*, the U.S. Supreme Court has set out guidelines governing punitive damages awards * * *. But, we understand as well as the next court how to * * * articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. Even judges

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[15] That the court below reduced the jury's award against InterContinental from $3 million to $1 million, evidently on state law grounds, in a sense emphasizes this point. The court offered no explanation for the reduction, or for why the $1 million figure was supportable. See App., *infra*, 29a-30a. This sort of arbitrary tinkering with the jury's verdict—which left in place an award that was grossly excessive—cannot be considered a "meaningful and adequate" safeguard against arbitrary punishment.

> who are remarkably dim bulbs know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences.

Id. at 907 (footnote omitted).

To offer just the most recent example of this phenomenon in Alabama, a trial court has upheld a $25 million award returned against an insurance company for the fraud of its agent—although it is undisputed that the defendant insurance company itself was a victim of the fraud (the renegade agent was pocketing the premiums), itself discovered the fraud, itself notified the policyholders of the fraud, and itself made unconditional make-whole offers to all of the agent's victims (including the plaintiffs) prior to the initiation of any litigation. *Sheridan* v. *Northwestern Mut. Life Ins. Co.*, No. CV-89-2505-PR, slip op. (Ala. Circuit Ct. Apr. 10, 1992), appeal pending, No. 1911110 (Ala. 1992). The court nevertheless upheld the award because, it imagined, the jury might have believed that the company "made a conscious decision to keep a top-selling agent under contract with the knowledge that he was a threat to defraud its policyholders." Slip op. at 4. Needless to say, this simply is not meaningful judicial review.

It bears emphasis that we do not take issue with particular factual findings below or suggest that this Court should delve deeply into the record. Instead, the necessity is for clear and objective standards that may be applied by lower courts, as well as for meaningful review when—as in Alabama—the instructions vest broad discretion in the jury. Absent further guidance from this Court, the parade of grotesquely excessive punitive awards inevitably will continue.

4. Finally, review is appropriate here because this case is in most relevant respects typical of the constitutionally excessive punitive awards being returned and affirmed by the lower courts. The extraordinary award here is not remotely justified by the nature of InterContinental's conduct—thus making this case useful as a benchmark for illustrating what does not constitute a reasonable relationship between punitive and compensatory damages.

To begin with, the punitive damages here are 80 times the size of the compensatory award—which itself is not trivial. Because in most cases compensatory damages represent a fair measure of the societal injury caused by the defendant's conduct and thus reflect the strength of society's interest in deterring such conduct in the future, a gross disparity between punitive and compensatory awards is a telltale indicator that the punitive component is excessive. And while there may well be circumstances in which ratios higher than the four-to-one found "close to the line" in *Haslip* are justified, that surely does not mean, as the Alabama Supreme Court has held, that the relationship between punitive and compensatory damages is constitutionally irrelevant. Indeed, such a conclusion simply cannot be squared with the Court's recognition in *Haslip* that punitive damages must bear "some understandable relationship to compensatory damages." 111 S. Ct. at 1045.

In nevertheless affirming the award here, the court below relied entirely on what it termed the "reprehensibility" of petitioner's conduct. But it is plain that the punitive award in this case is "grossly out of proportion to the severity of the offense." *Haslip*, 111 S. Ct. at 1045. As discussed above, petitioner did not violate any standard of conduct known (or

knowable) to it at the time that it acted. Its denial of respondent's claim therefore was not "wrongful" at all; at worst, in the characterization of the West Virginia Supreme Court of Appeals, InterContinental's acts were "really stupid." And now that the Alabama Supreme Court has established petitioner's obligations under Alabama insurance law, there is no reason to believe that *any* punitive damages are necessary to ensure future compliance with state law. Similarly, InterContinental did not act in a deceitful or surreptitious manner: it lapsed the policy prior to Rodenberry's death and told respondent why it denied her claim. It is undisputed that the company did not know of Rodenberry's illness and therefore cannot be deemed to have lapsed the policy in order to avoid paying the death benefit. Nor did petitioner's conduct cause respondent to suffer particularly great or nonpecuniary injury.

If a $1 million penalty and an 80-to-one punitive-to-compensatory ratio are supportable in such circumstances, there is no substantial constitutional limit on punitive awards. That plainly is the view of the court below—and of many other courts across the country. If this Court agrees, it should make that clear so as to bring an end to continuing litigation about the constitutionality of punitive damage awards. But if it disagrees, as *Haslip* suggests is the case, the Court should intervene to brake the never-ending march of excessive punitive judgments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1992

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1991-92

89-14

INTERCONTINENTAL LIFE INSURANCE COMPANY

v.

LOU RODENBERRY LINDBLOM

Appeal from Jefferson Circuit Court

(CV-86-7156)

On Remand from the United States Supreme Court

[Released May 1, 1992]

ADAMS, JUSTICE.

Our previous opinion in this case has been reported at 571 So. 2d 1092. In that opinion we remitted a judgment of $3,012,400 to $1,000,000. The defendant insurer sought review by the United States Supreme Court. On March 4, 1991, while review of this case was pending in the United States Supreme Court, that Court held, in another case on review from this Court, that mechanisms providing for trial and appellate review of punitive damages awards in Alabama were sufficient to ensure that a judgment based

on a jury's verdict of $1,040,000 against another insurance company defendant did not offend the substantive due process guarantee of United States Const. amend. XIV. *Pacific Mut. Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S. Ct. 1032 (1991). Thereafter, that Court vacated the judgments in a number of cases, including this Court's prior judgment in this case, *Intercontinental Life Ins. Co. v. Lindblom*, —— U.S. ——, 111 S. Ct. 1575 (1991), *vacating* 571 So. 2d 1092 (Ala. 1990), and remanded those causes for reconsideration in light of *Haslip*. See also *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989), *vacated*, —— U.S. ——, 111 S. Ct. 1298 (1991), *reinstated on remand*, 934 F.2d 1377 (5th Cir. 1991); *Southern Life & Health Ins. Co. v. Turner*, 571 So. 2d 1015 (Ala. 1990), *vacated*, —— U.S. ——, 111 S. Ct. 1678 (1991), *reinstated on remand*, 586 So. 2d 854 (Ala. 1991). On remand, the parties, through briefs and oral argument, presented to this Court their respective positions in light of the United States Supreme Court's ruling in *Haslip*.

InterContinental Life Insurance Company ("InterContinental") contends that *Haslip* mandates a substantial further reduction of the jury's award against it in this case. It bases its reduction argument on two principal grounds. First, it contends that "in the ordinary case, with no special aggravating factors, *Haslip* makes clear that the presence of a ratio" of punitive damages to compensatory damages "far in excess of 4:1 signals that the punishment is likely to be excessive." *Brief of Appellant InterContinental Life Insurance Company on Remand from the Supreme Court of the United States ("Appellant's Remand Brief")*, at 12-13. Second, it contends that "the reprehensibility of InterContinental's conduct was slight and does not support a large punishment." *Id.* at 29 (emphasis deleted).

InterContinental's first ground, that of proportionality, was fully addressed and ultimately rejected by this Court

on the remand from the United States Supreme Court of *Southern Life & Health Ins. Co. v. Turner, supra.* We will not revisit that argument here. However, in order to address properly InterContinental's reprehensibility argument, pursuant to the mandate of the United States Supreme Court, we must briefly revisit the arguments regarding the weight of the evidence of fraud and bad faith —the two counts on which the award of punitive damages must rest.

I. Fraud

As our cases indicate, "a cause of action for deceit or willful fraud, for which punitive damages are recoverable, requires proof that the defendant knew his representation was untrue at the time he made that representation or that he made the representation with reckless disregard for the truth. Code 1975, § 6-5-103." *Haslip*, 553 So. 2d at 540. In the insurance context, the act of accepting premiums constitutes a representation by the insurer that the policy is in full force and effect. Such a representation, when made without the corresponding intent to pay the proceeds in the event of a claim and coupled with reliance by the insured, constitutes willful fraud. *Id.* at 542; *Old Southern Life Ins. Co. v. Woodall*, 348 So. 2d 1377, 1380-81 (Ala. 1977).

In this case, Intercontinental accepted premium payments that were made by Mrs. Lindblom from January 1984 through August 1985, virtually all of which were made after the expiration of the 31-day grace period provided by the policy. InterContinental concedes that the evidence presented at trial "sufficed to permit the jury to find that InterContinental had failed" to notify Mrs. Lindblom as required by "accepted practices in the insurance industry" that she was tendering her payments outside the written grace period, or that the policy was in danger of lapse. *Appellant's Remand Brief*, at 4 n.1.

At trial, InterContinental defended its conduct by reference to an unwritten "courtesy" period of an additional 14

days, which, it argued, allowed it to accept payments tendered outside the 31-day grace period. This extra-contractual period, InterContinental contends, represented merely a "voluntary, noncontractual *benefit* to its policy-holders." *Id.* at 4 (emphasis added). The purpose of the courtesy period is, however, susceptible of a different interpretation.

Mrs. Lindblom contends that the unwritten courtesy period represented a scheme, which she says began in February 1984 with InterContinental's retroactive credit of the February 2, 1984, premium payment to the amount due in January, and by which she says InterContinental sought to maximize the benefit to *itself* and to minimize its liabilities to the insured, Ms. Tommie Rodenberry, or her beneficiaries. Under this interpretation, InterContinental could continue to accept the premiums without the concomitant contractual duty to pay benefits in the event of a claim. Indeed, Donna Faulkner, an employee of InterContinental, conceded that InterContinental's practice of accepting premium payments tendered during the courtesy period "technically" allowed it to "take the money" and to reject at "anytime" a claim made under the policy. Her interpretation of the consequences of InterContinental's practice was reinforced by the testimony of InterContinental's senior vice president, James Grace. On cross-examination, Mrs. Lindblom's counsel asked: "Well, you told me in your deposition that technically, if [Tommie Rodenberry had] died at any time during the period [following January 1984 when the payments were being tendered] outside of the 31-day grace period, you didn't have to pay it?" To that question Mr. Grace responded: "Yes."

InterContinental continued to accept checks dated after the expiration of both the grace period and the courtesy periods until the death of the insured. More specifically, on September 15 and October 8, 1985, Mrs. Lindblom executed checks, which, she assumed, represented payment

for September and October 1985, respectively.[1] Although InterContinental's computer "designated the policy 'terminated' " following receipt of the check dated September 15, 1985, *Lindblom*, supra, at 1095, InterContinental, without requiring a reinstatement of the policy, cashed the September check on September 23. It deposited the October check on October 21—only two days before the death of the insured for which InterContinental denied contractual liability.

Also, the undisputed fact that InterContinental made no effort to determine whether Mrs. Lindblom had a viable claim under the policy further strengthens the inference that it accepted the premiums without the intent to pay the proceeds in the event of a claim. Indeed, InterContinental insists that its refusal to investigate the claim was immaterial because, it argues, it was not *contractually* compelled to pay the proceeds. Thus, it insists, an investigation of the facts leading to the claim would have yielded the same result.

InterContinental concedes that the "evidence would permit a finding of administrative shortcomings, inattention to established procedures, and . . . a lack of due regard for Lindblom's rights under the policy." *Appellant's Remand Brief*, at 29-30. It contends, however, that its conduct "falls far short of demonstrating any deliberate effort by InterContinental or its employees to cheat its policyholders generally or Lindblom in particular." *Id.* InterContinental contends, in other words, that its conduct did not "involve malice, oppression, or any other form of conscious wrongdoing." *Id.* at 30.

From the evidence presented, however, the jury was free to accept or reject InterContinental's construction of the evidence. The fact that another jury may have accepted InterContinental's version, which this jury rejected,

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[1] The September check was dated on the day that the courtesy period expired.

is of no consequence to the issue before us, so long as the jury's verdict is in fact supported by the evidence. As we have stated previously, *InterContinental*, 571 So. 2d at 1099, and do now reaffirm, the record supports a determination that InterContinental's practice, which *continued unabated until a claim was made on the policy*, of accepting premium payments after the expiration of the grace and courtesy periods constituted a willful misrepresentation that the policy remained in force.

Indeed the jury may have reasonably interpreted InterContinental's intentions as to the policy in the following manner: (1) InterContinental consistently accepted premium payments after the expiration of the grace period; (2) in the event of a claim, InterContinental intended to treat the policy as lapsed; (3) in the event of litigation, InterContinental intended to justify its acceptance of the premium payments by alleging the existence of an additional unwritten "courtesy" period; (4) InterContinental reasoned that its acceptance of the premium payments before and after the expiration of the courtesy period might estop it from denying coverage in the event of a claim, believing, however, that its liability would extend only to the amount of the policy; (5) in the event of litigation, InterContinental hoped to preclude verdicts of fraud or bad faith, with the consequent liability for punitive damages, by resorting to an argument based on the *contractual grace period*, that is, by contending that it had a contractual right to deny the benefits; and (6) InterContinental did not attempt to investigate Mrs. Lindblom's claim because, from February 1984, it knew that it was going to deny liability under the contract. An award of punitive damages was, therefore, proper under the misrepresentation count.

II. Bad Faith

InterContinental attempts to distinguish this case from other cases involving claims of bad faith. More specifically, it insists that in this case it denied coverage *before* a

claim was made, that is, following the tender of the premium payment dated September 15, 1985; whereas, in the usual case the insurer denies coverage only *after* the filing of a claim.

This argument, however, ignores the fact that by accepting both the September and October premium checks and, especially, by depositing the October check on October 21, InterContinental was treating the policy as effective two days before Tommie Rodenberry died. Moreover, Mrs. Lindblom produced the testimony of expert witness Edwin Trowbridge, whose testimony was based, *inter alia*, on his examination of approximately 47 of InterContinental's claim files. He expressed the opinion that the policy would have remained in force except for the death of Tommie Rodenberry in October 1985. Cross-examination of Mr. Trowbridge produced the following:

> "Q. You have no basis for saying that Mrs. Rodenberry's policy would still be in force and effect today if she had lived and were not critically ill in the fall of 1985?
>
> "A. I *have* a basis [for saying] that it would. The policy would still be in force. From my review of the payment history, the policy would be in force. It indicates that if that lady were alive today, they would still be paying premiums. The basis is the review of all of these dates and all of this indicates that they continually accept the premiums outside the grace period."

(Emphasis added.) Based on this evidence, the jury could reasonably have concluded that InterContinental did not *actually* regard the policy as lapsed until *after* the death of the insured. The situation involved in this case thus differs little, if any, from those ordinarily presented in claims alleging bad faith. The distinction urged by InterContinental is, therefore, without merit, and the jury could properly award punitive damages under the count alleging bad faith.

III. Factors Considered on Review of Punitive Damages Award

In *Haslip*, the United States Supreme Court cited with approval a number of review factors applied by this Court in its original opinion to arrive at the judgment conditionally affirmed in this case. In addition to the "comparative verdict" analysis we employed, the factors included:

> "(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation."

Haslip, —— U.S. at ——, 111 S. Ct. at 1045. See also *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). A number of these factors bear with particular force upon the facts presented in this case.

First, the unusually subtle nature of the practice employed by InterContinental rendered detection particularly difficult. Moreover, the trial court, in an order following the hearing as required by *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), on InterContinental's post-trial motion alleging that the verdict was excessive, noted the "evasive and inconsistent testimony" presented by

InterContinental's employees, including its senior vice president; that testimony indicated an ongoing attempt at "concealment" of facts relating to its wrongful conduct.

Second, regarding the "existence and frequency of similar past conduct," Mr. Grace testified as follows:

> "Q. Now, you have also told me before, and is it still your testimony today in this court, that it is . . . InterContinental's custom and practice, given circumstances such as those existing in this case—circumstances including the continuous acceptance of premiums without any pre-waiver or pre-lapse notice —that it's your company's custom and practice to handle this type of claim exactly this way?
>
> "A. Yes, it is our custom and practice to handle this claim this way.
>
> "Q. *All of them?*
>
> "A. That is correct."

(Emphasis added.) The evidence thus indicated widespread use of similar conduct and thus a high potential for harm similar to that suffered in this case. The frequency of this practice also increased InterContinental's potential for "profitability" from it. Finally, no criminal sanctions or civil penalties have been imposed upon InterContinental for its conduct in this instance as to require mitigation of the punitive damages award.

In view of these and other factors, we reject InterContinental's contention that the "reprehensibility of [its] conduct was [too] slight" to "support [such] a large punishment." *Appellant's Remand Brief*, at 29. Under our reading of *Haslip*, this Court's previous judgment against InterContinental in the amount of $1,000,000 bears a rational relationship to the legitimate goals of punish-

ment and deterrence. Consequently, that judgment is hereby reinstated.[2]

JUDGMENT REINSTATED.

Hornsby, C.J., and Shores, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

Maddox, J., concurs in the result.

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[2] From this holding it follows that Ms. Lindblom's motion to increase the amount of the supersedeas bond or to execute on Inter-Continental's assets is due to be, and is hereby, denied.

MADDOX, JUSTICE (concurring in the result).

As the majority correctly points out, the Supreme Court of the United States, on March 4, 1991, in *Pacific Mutual Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032 (1991), affirmed a punitive damages award as not violating the substantive due process guarantees of the United States Constitution. I was of the opinion that the Supreme Court of the United States would overturn this Court's judgment affirming the punitive damages award in *Haslip*, based on what individual Justices of that Court had said in other opinions involving the question of punitive damages.[3] I was wrong.

Although I am not quite sure why the Supreme Court remanded this case rather than affirming the judgment on the authority of *Haslip*, especially in view of the fact that we had already conducted a *Haslip* review and had ordered a remittitur,[4] I do agree with the majority that

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[3] Dissenting from this Court's affirmance of the punitive damages award in *Haslip*, I had expressed why I thought that the Supreme Court would reverse the judgment of this Court. See my special opinion in *Haslip*, 553 So.2d 537, 544 (Ala. 1989).

On original deliverance in this present case, I concurred specially in affirming the judgment, but pointed out that if the Supreme Court of the United States reversed *Haslip*, then the judgment in this case was also due to be reversed. This Court's judgment in *Haslip*, of course, was not reversed. On the contrary, it was affirmed, and then this case was remanded to us for reconsideration in light of the decision of the Supreme Court in *Haslip*.

[4] See my special opinion in *Southern Life & Health Ins. Co. v. Turner*, 586 So.2d 854, at 861 (Ala. 1991), another case remanded to us for reconsideration in light of *Haslip*. There, I expressed some of my reasons for being unsure why that case had been remanded to us rather than affirmed. In *Turner*, I also said the following:

> "I stated in the dissent in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537, 545 (Ala. 1989) that '[w]hile I applaud the procedure this Court has adopted to review and revise the jury's decision based on its "standardless discretion," I can-

this Court's original judgment is due to be reinstated. Consequently, I concur in the result reached.

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not believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions.' The Supreme Court concluded otherwise, and held that those procedures were adequate and meaningful. Post-*Haslip* reviews by this Court, including this one, indicate that the procedures, when actually applied, are not adequate and meaningful, as I have pointed out in dissents. In *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala. 1991), this Court overturned a trial court's judgment on review of a punitive damages award and held a state statute unconstitutional, even though the constitutionality of the statute had not been raised. In *Principal Financial Group v. Thomas*, 585 So.2d 816 (Ala. 1991), this Court upheld a $750,000 judgment, which was 750 times higher than the compensatory damages, even though the contractual issue of the liability of the company to pay was not finally determined until the jury resolved the issue in favor of the policyholder after a trial of the case.

"I concurred in the judgment on our original review of this case on condition the Supreme Court affirm the *Haslip* decision of this Court. That Court not only has affirmed that decision, but has remanded this case for reconsideration in light of *Haslip*.

"While I do not read *Haslip* as saying all that some other members of this Court apparently seem to think it says, I was wrong in my assessment of what the Supreme Court would decide in the *Haslip* case, therefore, I concur in the result only."

APPENDIX B

MONDAY, APRIL 15, 1991

CERTIORARI—SUMMARY DISPOSITION

90-1284

INTERCONTINENTAL LIFE INS.

v.

LINDBLOM, LOU R.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Alabama for further consideration in light of *Pacific Mutual Life Insurance Company* v. *Haslip*, 499 U.S. —— (1991).

APPENDIX C

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

89-14

INTERCONTINENTAL LIFE INSURANCE COMPANY

v.

LOU RODENBERRY LINBLOM

Appeal from Jefferson Circuit Court

(CV-86-7156)

ON APPLICATION FOR REHEARING

[Filed Nov. 16, 1990]

ADAMS, JUSTICE.

Our opinion of September 28, 1990, is withdrawn and the following is substituted therefor.

This is an appeal from a jury verdict awarding $3,012,400 to the plaintiff, Ms. Lou R. Lindblom, against the defendant, Intercontinental Life Insurance Company (hereinafter "Intercontinental"), for bad faith failure to pay insurance benefits, breach of contract, misrepresentation, and fraud. We affirm.

The appellant has raised many issues on appeal dealing with the denial of its post-trial motions and with questions regarding the constitutionality of the award of punitive damages. The record reveals the following facts relevant to this appeal:

In November 1980 Ms. Tommie Rodenberry applied for a life insurance policy with Intercontinental. Larry Culver of the Culver Agency submitted the application to Intercontinental. On December 1, 1980, Intercontinental issued a term life insurance policy (number 178427) to Tommie Rodenberry. The policy designated Ms. Lou R. Lindblom as the beneficiary of the policy, with $10,000 in benefits. The premium payments were originally due and payable quarterly beginning in December 1980. The policy provided in its relevant parts as follows:

> "PAYMENT OF PREMIUMS—The first premium is due on or before the Policy Date. You may choose to pay your premium at 12, 6, 3, or 1 month intervals. Each payment is due on or before the first day of the payment period. . . .
>
> "The policy shall lapse if premiums are not paid in full when due. Please refer to the 'Grace Period' provision.
>
> "GRACE PERIOD—a grace period of 31 days after the due date will be allowed for payment of each premium after the first, without interest, during which period the policy shall continue in full force. If the insured dies during the grace period, any pro rata premium due and unpaid will be deducted from the amount payable under this policy. This policy will lapse without value at the end of the grace period."

Intercontinental introduced evidence at trial that in addition to the written 31-day grace period, it voluntarily

granted an extended two-week (14-day) grace period at the end of the 31-day period, making the total grace period 45 days. This "extra" grace period was not included in the insurance contract, nor was Ms. Lindblom ever informed of its existence. Intercontinental introduced further evidence that if the end of the grace period fell on a weekend or holiday, the period was extended to the next business day.

From December 1980 through November 1983, Ms. Lindblom made the quarterly payments on the policy. Sometime in December 1983 or January 1984, she decided that she desired to convert the payment plan from the quarterly plan to a monthly plan. On January 1, 1984, she wrote to Intercontinental, informing it of her desire to pay the premiums monthly from then on and enclosing the monthly premium payment specifically designated for December 1983 ($32.06). This letter also stated that she would remit the payment for January 1984 as soon as she received notice from Intercontinental. At that time, the December 1983 payment was 31 days past due. It appeared from the evidence at trial that Intercontinental made no reply to Ms. Lindblom's letter.

Ms. Lindblom's next premium payment was made on February 2, 1984. Intercontinental decided to back-apply this payment to cover the January 1984, payment which was then unpaid and 32 days past due, outside the written 31-day grace period but within the unwritten extended grace period. Ms. Lindblom continued to remit payments each month from February 1984 through October 1985 to Intercontinental. Intercontinental accepted each of these payments.

Evidence offered at trial showed that while Ms. Lindblom made each payment in the early part of each month from February 1984 through October 1985, because of Intercontinental's decision to continuously back-apply these payments to cover the missed January 1984 pay-

ment, virtually all of these payments were received outside the 31-day grace period. During this time Intercontinental contacted Ms. Lindblom on at least two occasions to inform her of premium increases. At no time did Intercontinental inform her of the fact that she had missed the January 1984 payment or of the fact that her payments were continuously received outside the 31-day grace period.

Intercontinental continued its practice of back applying Ms. Lindblom's payments through August 1985, when problems began to develop. When Intercontinental received a check dated August 5, 1985, it applied it toward the July 1985 premium, which had not been paid. The next check Intercontinental received was dated September 15, 1985. Again, Intercontinental treated this check as the payment of the August 1985 premium. When this check was entered into the computer system, the computer designated the policy "terminated" and showed "no premium applied." Upon subsequent review of all such computer entries by Intercontinental, employees discovered that the check had not been applied to this policy because the policy had lapsed. Ms. Lindblom, who was at that time unaware of the problem, sent in her payment for October. On October 11, 1985, Intercontinental wrote Ms. Lindblom and informed her of the lapse. Ms. Lindblom, who believed she was current on the policy and could not understand how it had lapsed, contacted Mr. Culver at the Culver Agency about the problem. Ms. Lindblom presented Mr. Culver with copies of the cancelled checks for the August and September 1985 premium payments. Mr. Culver told Ms. Lindblom that he would take care of it. Mr. Culver instructed Ms. Lindblom to send him a copy of the cancelled October 1985 premium check when she received it from her bank. Later, when Mr. Culver received this check and spoke with Ms. Lindblom, he informed her that the policy was still in force.

On October 23, 1985, Tommie Rodenberry died. On November 8, 1985, Ms. Lindblom filed a claim with Intercontinental for the death benefits under the policy. After Intercontinental personnel examined the claim and the policy, they informed Ms. Lindblom, through the Culver Agency, that the benefits could not be paid because the policy had lapsed as of August 1, 1985, due to nonpayment of premiums. At this point Intercontinental did not refund any premiums paid after the alleged lapse. The Culver Agency contacted Intercontinental on several occasions and sent Intercontinental copies of the cancelled checks for Ms. Lindblom's August, September, and October payments. The Culver Agency apparently believed that the policy should not have lapsed and sought to assist Ms. Lindblom. On each occasion Intercontinental confirmed that the policy had lapsed effective August 1, 1985, and refused to pay the benefits. Intercontinental eventually refunded the amount of two payments received after the alleged lapse.

On November 19, 1986, Ms. Lindblom sued Intercontinental, the Culver Agency, and Mr. Culver, alleging wrongful refusal to pay the benefits under the policy and seeking $10,000 compensatory damages and $1,000,000 punitive damages. Upon Intercontinental's petition, the case was removed to a federal district court. The federal district court, however, found removal inappropriate and remanded the case to the Circuit Court of Jefferson County.

After remand, Ms. Lindblom amended her complaint to allege that the Culver defendants had been guilty of misrepresentation and concealment while acting as agents of Intercontinental. Ms. Lindblom's complaint, in its final form, alleged: breach of contract, bad faith failure to pay on the insurance contract, misrepresentation, fraudulent suppression, outrage, and conversion. Intercontinental moved for summary judgment on all claims. The trial court granted the motion as to the claims of out-

rage and conversion, but denied it as to the other claims. At the end of the plaintiff's case-in-chief and again at the end of the presentation of all the evidence, Intercontinental moved for a directed verdict, which was denied. After closing arguments, Intercontinental requested a special verdict and requested that the jury be given verdict forms to differentiate compensatory damages from punitive damages. The trial judge denied these requests and submitted the case to the jury.

The jury returned a verdict exonerating the Culver defendants from any liability but assessing damages against Intercontinental in the amount of $3,012,400. Intercontinental timely filed alternative motions for a judgment notwithstanding the verdict, a remittitur, or a new trial. These post-trial motions were denied by the trial court. Because one of the issues raised in the post-trial motions was an alleged excessiveness of the verdict, the trial judge, pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), conducted a hearing on that issue and found no excessiveness.

As noted, Intercontinental has raised several issues for our review on this appeal. At the outset however, we must address the nature of the insurance policy issued by Intercontinental and the actions of the parties involved. An examination of these factors will effectively dispose of the issues raised by Intercontinental, requiring only minimal review. Our consideration of these areas requires a two-step analysis: (1) an examination of the insurance contract itself and (2) an examination of the conduct of the parties.

With respect to the insurance contract, the primary area of concern is with the grace period. As set out above, the insurance contract contains at 31-day grace period for the receipt of insurance premiums. Intercontinental maintains that it voluntarily grants an additional grace period of two weeks (14 days) at the end of

the 31-day grace period, making the total grace period 45 days. This additional extended grace period is not mentioned anywhere in the policy, nor was it ever revealed to Ms. Lindblom. In our review of this case and of the insurance contract, we cannot give any validity to this extended, *unwritten* grace period, as it is not part of the written contract and never became part of the contract. The "extended grace period" argument, under the facts of this case, appears to be merely a convenient way for Intercontinental to justify its acceptance of premium payments outside of the 31-day grace period, insure continued payments, and keep the policy in force, all without the knowledge of the insured or the beneficiary.

Because Intercontinental set up a practice whereby it continuously back-applied some 20 or more payments it received outside the 31-day grace period and made no attempt to treat the policy as lapsed, it could not arbitrarily cease this practice and treat the policy as lapsed in August 1985 by claiming that payment was not made within the 31-day grace period. This Court will not allow Intercontinental to establish such a practice and then to suddenly change it. Allowing such a practice gives Intercontinental virtually absolute power over the contract and leaves persons such as Ms. Lindblom helpless.

Moreover, a plausible alternative reading of the evidence could indicate that the policy actually lapsed in January 1984 when Ms. Lindblom informed Intercontinental that she would remit the January payment as soon as she received notice. Because Intercontinental never notified her as to the change in payment plans, her next check was dated February 2, 1984, and Ms. Lindblom made each subsequent payment on time, including the August and September 1984 payments. We conclude that Intercontinental waived its right to lapse the policy by not doing so when the January payment was overdue and by accepting payments past the 31-day grace period.

Because it impliedly agreed to accept payments made outside the grace period for approximately two years, Intercontinental could not arbitrarily stop this practice in August 1984. Furthermore, Intercontinental ignored the missed January 1984 payment and back-applied all subsequent payments. With respect to the specific issues Intercontinental now raises on appeal, we have consolidated several issues for clarity and briefly address them below, in light of the foregoing.

Intercontinental raises five issues in this appeal: (1) Whether a judgment notwithstanding the verdict should have been granted for Intercontinental on any of the plaintiff's claims; (2) whether a new trial should have been granted for Intercontinental on the ground that the jury returned a general verdict and at least one of the claims against Intercontinental was insufficient; (3) whether a remittitur or a new trial should have been granted for Intercontinental on the ground that the jury's verdict was necessarily the result of bias, passion, or other improper motive and was otherwise excessive; (4) whether the verdict is unconstitutional under the due process clause of the United States Constitution; and (5) whether a remittitur or a new trial should be ordered by this Court on appeal.

Intercontinental first argues that a judgment notwithstanding the verdict should have been granted in its favor with respect to the plaintiff's claims of breach of contract, bad faith, and misrepresentation. We disagree. Our discussion of Intercontinental's right to a J.N.O.V. will bring into focus our view of Intercontinental's other claims. We begin by stating the standard of review applicable to a denial of a judgment notwithstanding the verdict, as set out by this Court in *Elrod v. Ford*, 489 So. 2d 534 (Ala. 1986):

> "To be entitled to either a directed verdict or J.N.O.V., Defendant must have proved to the trial judge that, from the evidence before the court at the

> time each motion was made, there was 'a complete absence of proof on a material issue or [that there were] no controverted questions of fact on which reasonable people could differ,' and that Defendant was entitled to judgment as a matter of law. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 773 (Ala. 1984). Stated conversely, the motions for directed verdict and J.N.O.V. should not have been granted if reasonable inferences in favor of Plaintiff's claims could have been drawn from the evidence or if there was any conflict in the evidence for resolution by a jury. *O'Donohue v. Citizens Bank*, 350 So. 2d 1049 (Ala. Civ. App. 1977)."

489 So. 2d at 537. With regard to each of these claims, the plaintiff has clearly met the burden set out in *Elrod*. Contrary to Intercontinental's argument, the plaintiff presented sufficient evidence to warrant submission of her claims to the jury.

Intercontinental first attacks the plaintiff's breach of contract claim. Intercontinental contends that its actions of accepting payments did not constitute a waiver, because, it says, the company policy was to grant an additional 14-day grace period. We have dealt with this grace period above and only need point out here that the extended grace period has no validity. As for Intercontinental's actions in accepting payments outside the 31-day period, the plaintiff's evidence raised reasonable inferences supporting the argument that Intercontinental did waive any right to "lapse" the policy due to late payments and thereby breached the contract by lapsing the policy and refusing to pay benefits. Furthermore, the evidence could have supported a finding that the policy actually lapsed in January 1984, and that all subsequent payments were made on time, and that because Intercontinental did nothing in January it waived any right to lapse the policy in August. This claim was, thus, properly submitted to the jury.

The second claim Intercontinental attacks is the bad faith claim. Intercontinental argues that even if it was not entitled to a judgment notwithstanding the verdict on the breach of contract claim, it was entitled to one on the bad faith claim, because, it argues, the plaintiff's proof in support of her contract claim does not rise to the level entitling the plaintiff to a directed verdict. *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982). In *Dutton*, as Intercontinental correctly points out, Justice Shores stated:

> "In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim."

Dutton, 419 So. 2d at 1362 (citing *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179 (Ala. 1982)). While both parties acknowledge that the plaintiff did not move for a directed verdict, in reviewing the evidence we have come to the conclusion that the plaintiff would have been entitled to a directed verdict; thus the *Dutton* requirement was satisfied. The evidence in support of that claim is overwhelming. Because Intercontinental had no legal justification for refusing to pay the claim, no matter how the evidence is construed, the only reasonable conclusion is that Intercontinental breached the contract when it refused to pay the benefits.

Assuming, arguendo, that the plaintiff would not succeed on a motion for directed verdict, Intercontinental's contention still fails. This Court has addressed this issue on numerous occasions. We have consistently noted that there will be many cases that do not meet the qualification of "normal" or "ordinary" spoken of in *Dutton*, and that in such cases the "directed verdict on the contract claim" test should not apply. *See National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982) (Jones

J., concurring). *See also Thomas v. Principal Financial Group*, [Ms. 88-834, August 3, 1990] —— So. 2d —— (Ala. 1990) (wherein Justice Houston undertook an exhaustive analysis of the development of the "directed verdict on the contract claim" test). The case now before this Court is just such a case.

The two elements of a bad faith claim were set out in *Chavers v. National Security Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981):

> "[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (1) intentional failure to determine whether or not there was any lawful basis for such refusal.'"

Chavers, 405 So. 2d at 7 (quoting *Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So. 2d 1054 (Ala. 1979)). As mentioned above, *Dutton* established the "great" burden that is on the plaintiff in proving a bad faith claim. *Dutton*, however, qualified the rule regarding this burden so as to prevent the insurer from avoiding liability in certain extreme situations. After *Dutton*, we found it necessary on several occasions to restrict the application of this great burden.

First, in *Continental Assurance Co. v. Kountz*, 461 So. 2d 802, 806 (Ala. 1984), we stated:

> "Second, even if Continental could defeat Kountz's directed verdict on the contract claim, this case is not the 'normal' or 'ordinary' case described in *Dutton*; in an extraordinary case like this the directed verdict standard is inapplicable. *Aetna Life & Cas. Insurance Company v. Lavoie*, 470 So. 2d 1060 (Ala. 1984)."

In *Kountz* we noted that proof of an intentional failure to determine whether there was a lawful basis for denying

payment could be used to establish that the insurer had no legitimate reason to deny the payment. *Kountz*, 461 So. 2d at 807. This Court in *Kountz* held that the evidence showed that the insurer had intentionally failed to determine whether there was a lawful basis for denying the claim, and that that showing supported an inference of bad faith. *Id.* at 808. *See also Aetna Life & Casualty Insurance Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1984) (extraordinary evidence of "reckless indifference" toward insured in breach of duty of good faith and fair dealing properly submitted to jury).

In *Jones v. Alabama Farm Bureau Mutual Casualty Co.*, 507 So. 2d 396 (Ala. 1986), the only basis of denial rested on the resolution of the single factual issue of what the insured had told the insurance adjuster. In *Jones* we stated:

> "Although the plaintiff's burden of proof in a bad faith action is great, it should not be insurmountable. Precluding a plaintiff's bad faith action by application of the 'directed verdict on the contract claim' test when the disputed factual issue arises solely from a contradicted oral conversation between the insurer and the insured . . . puts too onerous a burden on the plaintiff. Moreover, it would frustrate the purpose of the bad faith action by allowing an insurer simply to misrepresent the content of an oral conversation to avoid liability."

Jones, 507 So. 2d at 401. *Jones* held that it was error to grant a partial summary judgment because there was a disputed factual issue to be decided by the jury. *Id. See also United American Insurance Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) (it would frustrate the purpose of the bad faith action to allow an insurer to prevent a bad faith claim from going to the jury by misrepresenting the content of oral or written communications). The case now before us presents an analogous "extraordi-

nary" situation. Intercontinental, over the course of nearly two years, accepted and back-applied payments outside of the grace period and made no effort to investigate Ms. Lindblom's payment history or to inform her of possible lapses. Moreover, there was conflicting testimony as to whether any "pre-lapse" notices were sent to Ms. Lindblom. At trial, Intercontinental employees testified that such notices were sent, while Ms. Lindblom denied ever receiving them. Under the facts of this case, the existence or nonexistence of these notices raises a presumption in favor of the plaintiff's argument that Intercontinental intentionally ignored late payments in order to keep the policy in force, to guarantee continued payments, and failed to determine if there was any valid reason for denying the claim. Finally, we note that the evidence tended to show that Intercontinental employees, upon reviewing the denial of the claim, merely consulted a computer or other employees and reported that the policy had lapsed due to nonpayment of premiums. This effort by Intercontinental is wholly insufficient to amount to an investigation into the basis for the denial of payments. Intercontinental has not only intentionally failed to investigate whether there was a valid reason to deny the claim, but has also failed to investigate any part of the policy at any time. Under *Kountz* and *Aetna*, this intentional failure to investigate whether there was a valid reason to deny the claim amounts to an intentional failure to determine whether there was any lawful basis for denying the claim and creates the inference of bad faith.

Furthermore, considering *Jones* and *Brumley*, we note that the action of bad faith would be frustrated by permitting Intercontinental to avoid liability merely by misrepresenting the existence or the content of pre-lapse notices. The resolution of the issue whether these notices were sent to Ms. Lindblom, is partly determinative of Intercontinental's investigation practices throughout the existence of this policy. These facts illustrate why this case is anything but ordinary or normal. The facts pre-

sented a question whether Intercontinental investigated to determine if there was a valid reason to deny payment of benefits, and that question was properly submitted to the jury for resolution. We hold, therefore, that the *Dutton* "directed verdict on the contract claim" test does not apply here and that the trial judge properly submitted the bad faith claim to the jury.

Intercontinental also attacks the denial of a judgment notwithstanding the verdict on the misrepresentation claim. Here again, Intercontinental argues that the plaintiff made no showing of any misrepresentation. Contrary to Intercontinental's interpretation of the facts, the record contains numerous examples of misrepresentations to Ms. Lindblom. The actions of Intercontinental in continuously accepting late payments and its taking no steps to advise Ms. Lindblom of this fact or to advise her of its so-called extended grace period, as well as the actions of the Culver Agency, all create reasonable inferences to support the plaintiff's claim of misrepresentation. Thus, we hold that the trial judge properly submitted this claim to the jury for resolution.

The next issue raised by Intercontinental is whether a new trial should have been granted in its favor on the ground that the jury returned a general verdict and at least one claim against Intercontinental was insufficient. Intercontinental argues that if it was entitled to a directed verdict on any one or more of the plaintiff's five claims submitted to the jury, then the verdict must be set aside and a new trial ordered. In short, we are of the opinion that Intercontinental was not entitled to a directed verdict on any of the five claims. The plaintiff's evidence presented differing interpretations and raised reasonable presumptions in her favor. The trial judge properly denied Intercontinental's motion for a directed verdict and submitted the claims to the jury. Furthermore we see no error in the general form of the jury verdict.

Intercontinental next argues that a new trial or a remittitur should have been granted for Intercontinental because, it says, the jury verdict was necessarily the result of bias, passion, or other improper motive and was otherwise excessive. We disagree with both of its arguments.

After the jury returned the verdict, the trial judge entered his findings regarding questions of alleged excessiveness of the verdict, pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). After carefully reviewing the evidence before the jury, the trial judge concluded that the evidence clearly established that Intercontinental's conduct warranted the punitive award.

As for a motive for the jury to give an excessive verdict, Intercontinental maintains that the conduct of the plaintiff at trial in, among other things, testifying as to the nature of Ms. Rodenberry's illness, the presence of Ms. Lindblom's retarded son, and testifying that Ms. Lindblom remained at home to care for Ms. Rodenberry caused the jury to disregard the legal requirements applicable to Ms. Lindblom's claim and to decide the case out of passion and pity for Ms. Lindblom's situation. This argument is unpersuasive. Much of the testimony that Intercontinental now cites as error was either elicited by counsel for Intercontinental or was not objected to at the time the testimony was given. Furthermore, much of what Intercontinental claims caused the jury to abandon its duty to decide the case on legal grounds does not, as we see it, rise to a level that could have affected the jury in the manner Intercontinental contends. This is an extreme case. Much of the testimony Intercontinental now attacks is relevant and was properly put before the jury in order for it to make an informed decision.

Intercontinental next attacks the jury verdict as unconstitutional. Specifically, Intercontinental argues that the law of punitive damages lacks fundamental fairness because it is vague, arbitrary, and imposes no standards

or limits. However, as Intercontinental correctly points out, the Supreme Court of the United States held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, —— U.S. ——, ——, 109 S.Ct. 2909, 2916 (1989), that the excessive fines clause of the eighth amendment does not apply to punitive damages awards in cases between private parties. This Court has, in line with *Browning-Ferris*, consistently declined to hold that the award of punitive damages is unconstitutional. *See HealthAmerica v. Menton*, 551 So. 2d 235 (Ala. 1989); cert. denied, —— U.S. ——, 110 S. Ct. 1166 (1990); *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989); *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), cert. granted, —— U.S. ——, 110 S. Ct. 1780 (1990). Also, the trial judge carefully reviewed the evidence presented and the constitutional arguments raised and concluded that the award did not violate the Constitution. We agree with the trial court that the evidence of Intercontinental's conduct warranted the punitive award here and that that award is not unconstitutional.

Last, Intercontinental renews its argument before this Court that the award of $3,012,440.00 is excessive and urges this Court to order a remittitur pursuant to Ala. Code 1975, § 12-22-71. The trial court followed the *Hammond* guidelines and found no reason to disturb the jury verdict. However, this Court still has the responsibility to consider whether the award is excessive, because we must assure some degree of uniformity in the area of punitive awards.

After a thorough examination of the record in this case and a comparison of verdicts in similar cases that have come before this Court, we conclude that the award of $3,012,400 is excessive and should be reduced by $2,012,400. We therefore affirm the judgment of the trial court, conditioned upon the acceptance of a remittitur of

$2,012,400 by Ms. Lindblom, within 28 days of the date of this substituted opinion, which will result in a judgment in her favor of $1,000,000.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY; APPLICATION OVERRULED.

Hornsby, C. J., and Jones, Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox, J., concurs specially.

Kennedy, J., concurs in part and dissents in part.

MADDOX, JUSTICE (concurring specially).

I agree that under this Court's present case law the punitive damages award, as remitted, must be affirmed. However, I must point out that I dissented in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), cert. granted, —— U.S. ——, —— S.Ct. —— (1990), and that the issue raised in this case is the same as that presented in *Haslip*. Therefore, if the Supreme Court of the United States reverses this Court's judgment in *Haslip*, then the judgment in this case should also be reversed. I must await, as everyone else must, the decision of the Supreme Court of the United States in *Pacific Mutual Life Ins. Co. v. Haslip*.

KENNEDY, JUSTICE (concurring in part and dissenting in part).

The jury returned a verdict favoring Ms. Lindblom, and the trial court entered a judgment on that verdict. The trial court denied Intercontinental's motion for judgment notwithstanding the verdict and conducted a hearing, pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), in which it determined that the verdict was not excessive. A jury's verdict is presumed correct and will not be disturbed unless plainly it is erroneous or manifestly unjust. *United American Insurance Co. v. Brumley*, 542 So.2d 1231, 1233 (Ala. 1989); *Pate v. Sunset Funeral Home*, 465 So.2d 347 (Ala. 1984). That presumption of correctness is strengthened when a motion for new trial is denied by the trial court. *Brumley*, at 1233; *Hill Air of Gadsden, Inc. v. Marshall*, 526 So.2d 15, 17 (Ala. 1988). A remittitur is proper only when the record establishes that the award is excessive as a matter of law or that the verdict is based upon bias, passion, corruption, or other improper motive. *Hammond*, at 1379.

The record does not indicate that the jury's verdict was in any way improper. To apply properly the presumption of correctness that attends the jury's verdict requires that the judgment of the trial court in regard to liability be affirmed; the majority does affirm in that regard. I concur in the portion of the opinion that affirms the judgment as to liability. However, the record does not establish that the award was either excessive or based upon bias, passion, corruption, or any other improper motive; the trial court did not err in denying a remittitur. Accordingly, I dissent from the portion of the opinion that orders a remittitur.

APPENDIX D

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY, ALABAMA

Civil Action No. CV86-7156

LOU R. LINDBLOM,

Plaintiff

v.

INTERCONTINENTAL LIFE INSURANCE COMPANY, *et al.*,

Defendant

ORDER ON MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT OR,
ALTERNATIVELY, MOTION FOR NEW TRIAL

1. The defendant's Motion For Judgment Notwithstanding Verdict Or, Alternatively, Motion For New Trial, is denied and overruled. The defendant's request for remittitur is denied and overruled.

2. One of the grounds of defendant's motion is that the verdict was excessive. The trial court is commanded by *Hammond v. City of Gadsden*, 493 So2d 1374 (1986); *Jawad v. Granade*, 497 So2d 471 (1986) and succeeding cases to conduct a hearing on the factors considered in either granting or denying a Motion For New Trial alleging excessiveness, or with respect to remittitur. The Court has carefully studied the body of Alabama law regarding damages and remittitur:

> "The trial court may not substitute its own judgment for that of the jury in determining whether to grant a remittitur.

"The authority to disturb a jury verdict on the ground of excessive damages is one which should be exercised with great caution.

"A remittitur may be ordered in those cases where the court can clearly see that the verdict has been reached because of bias, passion, prejudice, corruption or other improper motives.

"The right to a trial by jury is a fundamental, constitutionally guaranteed right, Article 1, Section 2, Constitution of 1901, and, therefore, a jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection.

"A jury verdict may be constitutionally flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motives.

"The cases have consistently held that in deciding whether a jury verdict is excessive because it is the result of passion, bias, corruption, or other improper motive, a trial judge may not substitute his judgment for that of the jury.

"Only where the record establishes that the award is excessive as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive, may a trial court order a new trial or remittitur.

"Alabama Courts do not favor setting aside jury verdicts unless justice demands it, and the Supreme Court has warned repeatedly that the authority vested in courts to disturb a jury's verdict on the ground of excessiveness should be exercised in great caution.

"To permit a trial judge to substitute his judgment on the facts for that of the jury, or to give undue

presumption to the action of the trial judge in dealing with verdicts, would minimize the jury system (and render) juries advisors of the trial judge rather than a positive force in the administration of justice.

"Whether remittitur of a new trial should be granted on the grounds of excessiveness, the Alabama Supreme Court has said that neither remittitur nor a new trial is appropriate unless the verdict results from bias, passion, prejudice, or corruption or other improper motive. This strict standard, when the courts adhere to it, discourages judges from unnecessarily tampering with jury verdicts and thereby minimizes the potency of the argument that remittitur merely substitutes judicial opinion for jury opinion."

3. This Court carefully conducted the voir dire examination and observed the parties and their respective counsel along with the jury's reaction during the trial. The trial of the case was conducted on a highly professional level by competent, seasoned advocates for both sides. Frivolity was not present at the trial of this case. The jury recognized the seriousness of the issues that were being presented for their determination. At no time did it seem or appear to the Court that any part in this case received less than a fair, impartial trial before the jury.

4. This was a case stating actions in contract, fraud and tort of bad faith. Testimony from defendant's own employees that it accepted premium payments outside of the written thirty-day grace period contained in the policy of insurance involved in excess of twenty times. The court noted the reaction of the jury to the evasive and inconsistent testimony of defendant's corporate representative, James Grace, and its employee, Mary Newman. The Court observed the expert, and uncontradicted testimony presented on behalf of the plaintiff by Ed Trowbridge of Metropolitan Life. He testified that there was

no legitimate basis for denying the claim involved in this case and that defendant's actions in reviewing and refusing to pay the claim at issue were in violation of accepted procedures and practices in the insurance industry. This court also heard inconsistent testimony from defendant's employees and representatives regarding whether defendant ever established or followed a policy of sending written "pre-lapse notices" to customers, including the plaintiff, prior to the date the claim involved was denied. Defendant failed to produce any documentation or proof to support the testimony of its employee, Mary Newman, that such "pre-lapse notices" were sent to the plaintiff at any time. At no point during the trial of this case did Intercontinental nor any of its corporate officers admit any wrongdoing. From the facts, this court is reasonably satisfied that the insurance company deliberately or recklessly suppressed material facts from the plaintiff prior to the death of Tommie Rodenberry; and, this court is reasonably satisfied that the insurance company had no legitimate basis for denying the claim made the basis of this suit and/or failed to properly investigate the Lindblom claim and subject the results of the investigation to cognitive evaluation and review.

5. The amount of a civil fine or exemplary damages is largely left to the discretion of the jury. Alabama Law allows juries to fix punitive damages. This court knows of no reason why there should be any judicial invasion into the function of the jury under the facts in this case. The court finds nowhere in the record where it is established that the award is excessive because it is based upon bias, passion, corruption or other improper motive.

6. In addition to the above, the court has also considered those factors listed by the Supreme Court in *Hammond*, *supra*, as being appropriate for the trial court to consider. With regard to the culpability of the defendant's conduct, the evidence clearly established that the conduct of the defendant justified a punitive award.

The evidence presented was also sufficient to establish that defendant's actions or inactions were against recognized and accepted insurance industry standards.

The insurance industry should be discouraged from placing their interests above that of their customers when processing claims and adjusting insurance policies. Insurance companies are in a position to have knowledge and information which the lay person does not have.

The defendant has argued that the verdict in this case will adversely impact the insurance company. Any verdict for any party will have an adverse impact to some extent. The court does not find that this verdict on the defendant is such that would require a reversal of the jury's decision as to damages. In line with that same reasoning, the court does not find that the impact on innocent third parties is of such significance or consequences so as to reverse the jury's determination of damages.

7. The defendant raised Federal constitutional questions, in every possible and conceivable way and manner, during the trial of the case and on all post-judgment motions. In substance, defendant claims the award of damages in this case violates the due process clause of the United States Constitution in that

a. the award of punitive damages was committed solely to the authority and standardless discretion of the jury, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 77, 78-79 (1988) (O'Connor, J., concurring);

b. the standardless discretion of the jury in awarding punitive damages constitutes arbitrary action of the government, which is forbidden by the due process clause of the United States Constitution, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985, 4991-92 (U.S. June 25, 1989) (Brennan, J., concurring); and

c. the unbridled discretion of the jury in awarding punitive damages in this case amounts to unconstitutional vagueness and procedural due process violation, *Id.* at 4992 (O'Connor, J., concurring).

The court considered the constitutional issues when raised by defendant, both during the trial of the case and during the post-judgment arguments. This Court holds that the award by this jury of punitive damages did not violate the due process clause of the United States Constitution.

8. On post-judgment motion defendant submitted a sparse affidavit which says by implication that the verdict against the defendant would adversely impact the insurance company because its net income has been reduced. Yet, plaintiff, in post-judgment hearing, introduced annual statements of defendant filed with State of Alabama Department of Insurance showing that the defendant has millions and millions of dollars in assets. Therefore, this court finds that *Green Oil Co. v. Hornsby*, 539 So2d 218, does not apply. In *Green Oil* the trial judge on post-judgment *Hammond* motion had evidence of the company's and partners' worth and he found the punitive damages award was excessive because of its effect upon Green Oil and the partners. In the Supreme Court's words: "The Green Oil Company overcome the presumption of correctness that attached to the jury's award of punitive damages."

This court finds that this defendant did not overcome said presumption of correctness and the trial verdict stands.

9. It is therefore ORDERED, ADJUDGED AND DECREED that defendant's Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, For A Remittitur Or New Trial is denied and overruled.

All court costs taxed against said defendant.

DONE AND ORDERED this the 1st day of September, 1989.

/s/ Josh Mullins
JOSH MULLINS
Circuit Judge

cc: All counsel of record